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No. 94-1785

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1994

Commissioner of Internal Revenue
Petitioner,

vs.

Robert F. Lundy
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT, ROBERT F. LUNDY

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33 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES:

26 U.S.C. (Internal Revenue Code)

TREASURY REGULATIONS:

CASES:

MISCELLANEOUS:

INTRODUCTION

This brief is filed, pursuant to Supreme Court Rule 37, by *amicus curiae* in support of the Respondent, Robert F. Lundy. For the Court's information, your amicus is counsel of record for petitioners in *Richards v. Commissioner*, 37 F.3d 587 (10th Cir. 1994), petition for cert. pending, No. 94-1537, and *Rossman v. Commissioner*, 46 F.3d 1144 (9th Cir. 1995), petition for cert. pending, No. 94-1747. In addition to these two pending cases, your amicus was counsel of record for the taxpayers in *Galuska v. Commissioner*, 5 F.3d 197 (7th Cir. 1993) and *Anderson v. Commissioner*, 36 F.3d 1091 (4th Cir. 1994) (unpub), and filed a brief as *amicus curie* in support of the taxpayer in *Davison v. Commissioner*, 9 F.3d 1538 (2d Cir. 1993) (unpub).

Your amicus respectfully submits the following brief in the hope that it may be of assistance to the Court in its deliberations of this case.

ARGUMENT

I. IF THE TAXPAYER (LUNDY) HAD FILED A CLAIM FOR REFUND ON THE DATE THE NOTICE OF DEFICIENCY WAS MAILED TO HIM, HE WOULD HAVE BEEN ENTITLED TO REFUND OF THE DISPUTED TAX OVERPAYMENT.

The dispute in this case is very narrow, and boils down to the following question:

> To how much of a refund would Lundy have been entitled if he had filed a claim for refund on the date the IRS mailed the notice of deficiency?

This is the ultimate question resulting from the interplay of sections 6512(b)(3)(B) and 6511(b)(2). The applicable subsection of section 6511(b)(2) is then determined *solely* by reference to the

time a claim could have been filed. [1] The extent to which Lundy would have been entitled to a refund if he had filed a claim on the subject date will, in turn, depend on whether such a "claim" would have been filed "within the 3-year period prescribed in [section 6511(a)]." The exclusive focus is, therefore, what would have been the result if Lundy had filed a claim for refund on the notice of deficiency date (hereinafter "notice date").

The Internal Revenue Service has provided a ready answer to this question. In Revenue Ruling 76-511, 1976-2 C.B. 428, the IRS ruled that a claim filed on a late return is filed within the 3-year period prescribed by section 6511(a), and that all taxes paid within the preceding three years are refundable, pursuant to section 6511(b)(2)(A). The interpretation announced in the Ruling is plainly reasonable. Like the taxpayer in the Ruling, if Lundy had filed a refund claim on the notice date, he would have

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[1] The circuit court's analysis and rejection of the "deemed filed" claim is correct. Section 6512(b)(3)(B) refers to a situation as it would be "if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) * * *." The conditional "if" subsumes and takes into account the circumstance where a claim *has not* been filed. Treating a claim that has not been filed as if it actually were filed contradicts the statute. As the circuit court correctly noted, Congress knows how to use the term "deemed" when that is intended; the word "deemed" appears many times in the Internal Revenue Code. This is especially true where, as here, the government contends that this fictional claim is a claim that is not, and cannot be a return, notwithstanding that it is not contested that if Lundy had filed a return/claim on the notice date he would have received the refund. The subject clause is correctly interpreted as referring to a claim that the taxpayer *could have filed*. The Tax Court has so described it. *Galuska v. Commissioner*, 98 T.C. 661, 665, affirmed without discussion of this point 5 F.3d 195 (7th Cir. 1993).

Your amicus would also point out that the statement by the Seventh Circuit in *Galuska*, 5 F.3d at 196, quoted by Petitioner herein (Br. at 23), that Galuska "agrees that under Section 6512(b)(3)(B) he is deemed to have filed a claim for refund of the alleged overpayment * * * when the Commissioner mailed him the notice of deficiency," does not comport with the facts. A full 12 pages of the brief and reply brief for Galuska were devoted to disputing this very point.

satisfied all of the requirements for a refund of his overpaid taxes.

To avoid the obvious command of this Ruling, the government contends that any claim Lundy might have filed cannot, *under any construction*, have constituted a return. That is, it would have been what can only be described as a "naked claim." Thus, no return would have been filed on the date the naked claim would have been filed, the consequence of which is, according to the government, that such a claim cannot have been filed within the required 3-year period *after* the return was filed. The government contends this analysis invokes the 2-years after payment clause of section 6511(a).

The government takes this position, notwithstanding that its own regulations do not permit a "naked claim." Rather, the applicable regulations *require* that a claim in the present circumstances *must be filed on a tax return*. Moreover, judicial interpretation has established that the information and other formal requirements for a valid claim are coextensive with the requirements for a return. Thus, any claim that could have been filed, in order to constitute a valid claim, would, as a matter of law, also be a return. There is no authority to support the "naked claim" concept the government posits as the only claim that could have been filed on the notice date.

Although only a naked claim will support the government's position, there is no discussion in Petitioner's Brief addressing the possibility that such a document even could exist. Even if a naked claim is a theoretical possibility, the government's argument falls far short of demonstrating that Congress intended this peculiar creature, so dramatically different than what is commonly understood to be a "claim." Given that this fictional document *would not be valid* under the government's own regulations, even if it were actually filed, the failure to address this question is a glaring omission. Surely the government should at least be required to proffer some authority (or other explanation) in support of such a critical part of its argument.

1. A taxpayer who has not filed a return does not run afoul of the two year rule contained in the first clause of section 6511(a), because if a claim had been filed on that date, it would have to constitute a "return," as a matter of law, and would satisfy the 3-year rule of section 6511(a).

It is fundamental to the position of the government in this case that the claim referenced in section 6512(b)(3)(B) is not, and cannot be, a return:

> * * * on the date the notice of deficiency was issued and the statutorily imputed refund claim arose under Section 6512(b)(3)(B), "no return was filed by the taxpayer" (26 U.S.C. 6511(a)).

(Br. at 17). See also *Galuska*, 5 F.3d at 197 ("* * * the Internal Revenue Code does not empower the Tax Court to treat a taxpayer * * * who has not filed a return as of the date the deficiency notice was mailed as if he had filed a return by that date"). Although the government contends that the "deemed claim" construct is "wholly semantical" (Br. at 23), and suggests that the Fourth Circuit's criticism of that terminology might be irrelevant, *id*, to the contrary, this question is critical to the present issue. The government's interpretation can prevail *if, and only if*, a valid claim for refund does not also constitute a tax return (where a return has not previously been filed), as a matter of law.

Copious authority establishes that (1) no particular form is required for either a "return" or a "claim," and (2) the essential elements for a document to constitute a "return" are coextensive with the elements of a "claim." Curiously, none of the courts that has interpreted the question presently before this Court has considered this question, notwithstanding that it is critical to the application of section 6512(b)(3)(B), and some of those courts have relied on the conclusion that "no return" had been filed on

the date the notice of deficiency was issued. [2] The Tax Court, for instance, has never considered what constitutes a "claim" within the meaning of either section 6512(b)(3)(B) or 6511(a) or (b), even though that court distinguishes between a "return" and a "claim" in this context, [3] and that distinction is *crucial* to its rulings in these overpayment cases. [4]

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[2] The Seventh Circuit did not cite any authority for this point, merely concluding that a taxpayer could not be treated as if he had filed a return. *Galuska*, 5 F.3d at 197. This issue was argued on brief in the circuit courts in *Galuska, Davison (by amicus), Anderson, Richards and Rossman*, but none of those courts analyzed the question.

[3] In this very case the Tax Court stated:

> Petitioner also contends that the deemed claim should include a "deemed return". Again, we must disagree. Although one document could serve both functions--be a tax return and also be a claim for credit or refund--it does not follow that "tax return" and "claim for credit or refund" are interchangeable terms. In section 6511(a), the Congress uses the term "return" three times and the term "Claim for credit or refund" twice in close juxtaposition. From this, we conclude that the Congress understood there was a difference between a tax return and a claim for credit or refund. In section 6512(b)(3)(B), the application of which depends in part on section 6511(a), the Congress refers to a claim for credit or refund and does not refer to a tax return. From this, we conclude that, although section 6512(b)(3)(B) embodies a deemed-claim concept, it does not embody a deemed-return concept.

Lundy v. Commissioner, T.C.M. 1993-278.

[4] There is no question that, for purposes of section 6511, a return claiming on overpayment constitutes both a return and a claim, and that such a return/claim is necessarily filed within the 3-year period prescribed in section 6511(a). If Lundy had filed a return/claim on the notice date, he clearly would have been entitled to refund of his overpayment. The only conclusion possible from the decided cases on this issue is that the

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The difficulty with this distinction is that is does not withstand definitional scrutiny. First, where a return has not been filed, the IRS's own regulations mandate that a claim is to be filed on a tax return:

> In general, in the case of an overpayment of income taxes, a claim for credit or refund *shall be made* on the appropriate income tax return.

26 C.F.R. section 301.6402-3(a)(1) (Emphasis added). [5] See also *Taylor v. United States*, 83-2 U.S.T.C. ¶9456 (Cl. Ct. 1983) ("A taxpayer usually makes a refund claim by means of a tax return."). To be valid under this regulation, where a return has not previously been filed, a claim *must* be made on a return. This regulation, issued under the specific authority of section 7422(a), is a so-called "legislative regulation," [6] having "the same effect as a valid statute." *CWT Farms, Inc. v. Commissioner*, 755 F.2d 790, 800 (11th Cir. 1985) *cert. denied* 477 U.S. 903 (1986). See also *Water Quality Ass'n Employees Benefit Corp. v. United States*, 795 F.2d 1303, 1305 (7th Cir. 1986); *Anderson, Clayton & Co. v. United States*, 562 F.2d 972, 976 (5th Cir. 1977) *cert. denied* 436 U.S. 944 (1978). [7] Construing "claim" in section 6512(b)(3)(B) to exclude even the possibility that a claim may be made on an original return completely ignores the requirements of this regulation, an impermissible construction. See *Beckwith Realty, Inc. v. United States*, 896 F.2d 860, 90-1 U.S.T.C. ¶50,150 (4th Cir. 1990) (refund suit dismissed where the taxpayer failed to satisfy the requirements of an effective claim for refund, as defined in these regulation sections, even though the claim had been filed on the specified form).

In addition, it must be accepted as self-evident that "claim," as used in section 6512(b)(3)(B), contemplates a claim that would be legally sufficient if it were actually filed. The construction placed

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[4] (. . . c o n t i n u e d) claim referred to in section 6512(b)(3)(B) *cannot also constitute a return*. Thus, whether a "claim" is or may also be a return (or a return/claim) is determinative. At a minimum, it must be accepted that a claim *can* be made on a return. Thus, the government's position can be sustained *only* if the claim referred to in section 6512(b)(3)(B) is found to *exclude* a return/claim. There is nothing to indicate Congress intended such a restrictive definition.

[5] Where a tax return has been filed, 26 C.F.R. section 301.6402-3(a)(2) directs that a refund claim is to be made on an amended return.

[6] See *Brown-Forman Corp. v. Commissioner*, 955 F.2d 1037, 92-1 U.S.T.C. ¶50,075 (6th Cir. 1992) *cert. denied* 113 S.Ct. 87 (1992).

[7] Section 7422(a) specifically authorizes the Secretary to prescribe regulations for filing claims for refund. Regulations issued under specific statutory authorization are legislative regulations. Such legislative regulations, if consistent with statutory authorization, adopted pursuant to proper procedure, and reasonable, have the force of law. *Tamura v. United States*, 734 F.2d 470, 472, 84-2 U.S.T.C. ¶9545 (9th Cir. 1984); *Dillon Ranch Supply v. United States*, 652 F.2d 873, 880, 81-2 U.S.T.C. ¶16,371 (9th Cir. 1981).

Even if this regulation were considered an "interpretive regulation," it would be entitled to "great weight." See *Water Quality Ass'n Employees Benefit Corp.*, 795 F.2d at 1305; *Caterpillar Tractor Co. v. United States*, 589 F.2d 1040, 1043 (Cls. Ct. 1978). Interpretive regulations are those not specifically authorized by an originating statute, but finding their authority in section 7805(a), which permits the IRS to promulgate "all needful rules and regulations for the enforcement of this title * * *." See *Gehl Co. v. Commissioner*, 795 F.2d 1324, 1328 (7th Cir. 1986). The Tax Court has held that "[a]n interpretive regulation must be sustained unless unreasonable and plainly inconsistent with the revenue statute." *Shereff v. Commissioner*, 77 T.C. 1140, 1143 (1981). It is plain that this regulation is reasonable. The government seeks to avoid the rule of this regulation, but it has not articulated any reason it should be permitted to do so.

on this word by the courts, however, demands that the claim [8] (which even though not actually filed is to be analyzed as if it were filed) mentioned in section 6512(b)(3)(B) *cannot* comply with the requirements of the applicable regulations; that is, it cannot be legally sufficient. It makes no sense to accord legal significance to, and to treat as filed, a hypothetical claim which would be a nullity if it were actually filed. Congress intended the Tax Court's jurisdiction to depend upon a hypothetical *valid* "claim," not a hypothetical "nothing."

Second, both a tax return and a claim for refund must contain certain minimum information. Although returns are provided for in section 6011, which also contains specific authorization for the Secretary of the Treasury to prescribe the forms which are to be used for this purpose, the term "return" is not defined in the Internal Revenue Code. The regulations implementing this legislative mandate, and specifying the official forms to use, are found at 26 C.F.R. section 1.6011-1. Although the proper form (*i.e.*, Form 1040) may be preferred, it is neither mandatory nor the exclusive document to constitute a "return." Notwithstanding the regulations, this Court has held that a document not in conformance with the specified forms can still constitute a return. See *Florsheim Brothers Drygoods Co. v. United States*, 280 U.S. 453 (1930); *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172, 35-1 U.S.T.C. ¶9003 (1934). See also *United States v. Klee*, 494 F.2d 394, 74-1 U.S.T.C. ¶9412 (9th Cir. 1974); Rev. Rul. 74-203, 1974-1 C.B. 330.

A. *Return defined*. In *Beard v. Commissioner*, 82 T.C. 766, 777-780 (1984), the Tax Court synthesized these, and other cases cited therein, and found the following requirements to define what constitutes a "return:" (1) there must be sufficient data to calculate tax liability; (2) the document must purport to be a return; (3) there must be an honest and reasonable attempt to satisfy the

[8] Whether it be called "imputed," "deemed" or "hypothetical."

requirements of the tax law; and (4) the taxpayer must execute the return under penalties of perjury. 82 T.C. at 777.

B. *Claim for Refund defined*. Claim for refund, likewise, is not defined in the Internal Revenue Code. Claims for refund are provided for in section 7422. Congress directed the Secretary to make appropriate regulations governing claims for refund. See section 7422(a) (suit for refund cannot be maintained "until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, *and the regulations of the Secretary established in pursuance thereof.*") (Emphasis added). In duly promulgated regulations the IRS has ruled how a claim is made, and has provided that a claim for refund *must* be made on a return, where a return has not previously been filed. 26 C.F.R. section 301.6402-3(a)(1) (a claim for credit or refund of income taxes "*shall be made* on the appropriate income tax return.") (Emphasis added). [9] See also 26 C.F.R. section 301.6402-2; *United States v. Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 272, 2 U.S.T.C. ¶708 (1931). Thus, the IRS has provided the missing definition, and it has specified that *a claim must be a return*, where a return has not yet been filed.

C. *Comparison of requirements of returns and claims*. Comparing the *Beard* requirements establishes the functional identity of claims and (previously unfiled) returns:

(1) A claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof, and must identify the amount of refund sought, and the nature of the claim. That is, it must contain sufficient information to determine the correct tax liability. Applicable Treasury Regulations require that:

> [t]he claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. The statement of the

[9] See footnote 7, *supra*.

> grounds and the facts must be verified by a written declaration that it is made under the penalties of perjury. A claim which does not comply with this paragraph will not be con sidered for any purpose as a claim for refund or credit.

26 C.F.R. section 301.6402-2(b)(1). "The statute is not satisfied by the filing of a paper which gives no notice of the amount or nature of the claim for which the suit is brought, and refers to no facts upon which it may be founded." *United States v. Felt & Tarrant*, 283 U.S. at 272. See also *Berenfeld v. United States*, 442 F.2d 371, 375, 71-1 U.S.T.C. ¶9401 (Ct.Cl. 1971) (Refund claim must set forth "some specified reason indicating erroneous or illegal collection"); *Beckwith Realty, Inc. v. United States*, 896. F.2d 860, 90-1 U.S.T.C. ¶50,150 (4th Cir. 1990) (refund suit dismissed because the taxpayer failed to state with sufficient particularity the grounds for its claim).

In the context of a claim for refund where a return has not previously been filed, an obvious baseline requirement is to set forth the taxpayer's position of the correct amount of tax. That is, such a claim must, at a minimum, calculate a tax liability (and then compare it with the amount paid).

This specificity requirement is also incorporated in section 6512(b)(3)(B) by the requirement that the claim referred to in that section be considered as "stating the grounds upon which the Tax Court finds that there is an overpayment." The ground upon which Lundy claimed his overpayment is that his correct tax liability is less than the amount paid. The Tax Court found, indeed, the parties stipulated, that Lundy did, in fact, overpay his 1987 taxes. There is simply no difference between the information relied on by the Tax Court to make its finding, and the information that would have to have been required to be included in any claim filed on the notice date. That required information is precisely the same as would be required in a tax return.

(2) The second *Beard* requirement is that the document must purport to be a return. In *Beard*, the Tax Court discussed this requirement as follows:

> The [Supreme] Court [in *Florsheim Brothers*, 280 U.S. 453] recognized that the filing of a return that is defective or incomplete may under some circumstances be sufficient to start the running of the period of limitation. However, such a return *must purport to be a specific statement of the items of income, deductions, and credits* in compliance with the statutory duty to report information and to have that effect it must honestly and reasonably be intended as such.

Beard, 82 T.C. at 778 (Emphasis added, emphasis in original omitted). It is self-evident that any document purporting to be a refund claim, in the absence of a previously filed tax return, would have to contain an accurate tax computation, and would have to include a specific statement of the items of income, deductions and credits upon which such a computation would be based. This requirement, again, matches the second *Beard* requirement. Further, the normal way for a taxpayer to make a refund claim is to file a return. *Taylor v. United States*, 83-2 U.S.T.C. ¶9456.

(3) The third *Beard* requirement is that there must be an honest and reasonable attempt to satisfy the tax laws. Section 6512(b)-(3)(B) refers to a claim that sets forth the grounds upon which the Tax Court ultimately finds the overpayment. A claim that sets forth, or is considered to set forth, those grounds obviously is intended to constitute an honest and reasonable attempt to comply with the tax laws. Congress cannot have had any other intention in this provision. Moreover, by filing a petition in the Tax Court, a taxpayer submits to the jurisdiction of the court. No conclusion can be drawn other than that the taxpayer is considered to be

making an honest and reasonable attempt to comply with the tax laws.

(4) Finally, the fourth *Beard* requirement is that the document must be executed under penalties of perjury. This is also required for claims. 26 C.F.R. section 301.6402-2(b)(1).

Although the courts and the government attempt to distinguish between a tax return and a claim in the present context, no authority has been cited to support the distinction. Your amicus has not found any case in which a valid claim for refund that was filed when no tax return had yet been filed was held not to constitute a return. The only authorities that consider related matters either require such a claim to be made on a return, Treas. Regs. 26 C.F.R. section 301.6402-3(a)(1), assume the claim is filed on a late return, *e.g.*, Rev. Rul. 76-511, or a late return claiming the refund was actually filed. See *Curry v. United States*, 774 F.2d 852, 85-2 U.S.T.C. ¶9743 (7th Cir. 1985); *Mills v. United States*, 93-1 U.S.T.C. ¶50,019 (E.D. Tx 1992); *Risman v. Commissioner*, 100 T.C. 191, at 199, 203-04 (1993). [10]

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[10] Because the requirements for both documents are essentially coextensive, in an appropriate case there is certainly room for a taxpayer who files an incorrect document to argue that the document should nevertheless be considered a "return" as well as a "claim." Compare 26 C.F.R. section 301.6402-2 and *United States v. Felt & Tarrant Mfg. Co. v. United States*, 283 U.S. 269, 272, 2 U.S.T.C. ¶708 (1931); *Beckwith Realty, Inc. v. United States*, 896 F.2d 860, 90-1 U.S.T.C. ¶50,150 (4th Cir. 1990), setting forth minimum requirements for refund claims, with *Florsheim Brothers Drygoods Co. v. United States*, 280 U.S. 453 (1930); *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172, 35-1 USTC ¶9003 (1934); *United States v. Klee*, 494 F.2d 394, 74-1 USTC ¶9412 (9th Cir. 1974); *Beard v. Commissioner*, 82 T.C. 766, 777-780 (1984), providing that no specific form is required to constitute a return and describing what does constitute a return.

There is not room, however, for the government to ignore its own regulations and contend that the "claim" to which section 6512(b)(3)(B) refers is anything other than the claim required by its own regulations. That is a preposterous contention. "Just as men must turn square corners

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At the very least, it must be accepted that a legally sufficient claim *can* qualify as a return, for purposes of section 6511, even if it is not filed on the prescribed form. The only question remaining, then, is whether the "claim" referenced in section 6512(b)(3)(B), which is also a "claim" for purposes of section 6511(a), *excludes even as a possibility* that it might also constitute a return. Congress used this single word in both sections, and incorporated section 6511 by reference into section 6512(b)(3)(B). Under these circumstances, the only reasonable inference is that Congress intended the word "claim" to have the same meaning in both sections. They are *in pari materia*.

Certainly, there is nothing to suggest that the term "claim for credit or refund" in Section 6512(b)(3)(B) is anything other than co-extensive with that same term in Section 6511(a), including any regulatory or judicial interpretation.[11] Whatever the meaning

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[10] (. . . continued) when they deal with the government, *Rock Island, Arkansas & La. R.R. v. United States*, 254 U.S. 141, 143, 1 U.S.T.C. ¶38 (1920), so must government officials 'walk around the same block' when acting on the government's behalf." *Roberts v. United States*, 13 Cl. Ct. 774, 777 (1987), rev'd on other grounds, no. 88-1165 (Fed. Cir. Apr. 12, 1988) (unpub.). "The Government should turn square corners, not taxpayers alone." *deRochemont v. United States*, 91-1 U.S.T.C. ¶50,238 (Cls. Ct. 1991). The government, as well as taxpayers, are bound by these regulations.

[11] Congress used the same term (i.e., "claim") in two related sections. No definition was provided in either section. In all probability, Congress did not formulate any intention other than whatever "claim" means in section 6511, it has a like meaning in section 6512(b)(3)(B), and to the extent the meaning of that word is not clear, it was to be defined by the IRS and, ultimately, the courts. The definition which has developed is that "claim" includes a claim made on an original return. If Congress intended to deprive the Tax Court of jurisdiction in these circumstances, knowing that taxpayers who elect to litigate their liability in the Tax Court will suffer the severe consequence of forfeiting refunds they otherwise

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and scope of the term "claim for credit or refund" in section 6511(a), it has the same meaning in section 6512(b)(3)(B). All section 6512(b)(3)(B) requires is an examination of how a "claim" would be treated if it had been filed on the notice date. Because "claim" includes a claim made on an original return, the government's attempts to dismiss this even as a possibility misses the mark.

Section 6512(b)(3)(B) focuses the inquiry on how a claim would have been treated if the claim were filed when the notice of deficiency was issued. It is only by ignoring longstanding administrative and judicial interpretation to the contrary that the government arrives at the conclusion that this one type of "claim" is outside the scope of Section 6512(b)(3)(B), notwithstanding that it is a valid "claim" for virtually all other purposes. The only construction under which the government's position can be sustained would be that the word "claim" in section 6512(b)(3)(B) *specifically excludes* a claim made on an original return. There is no evidence Congress intended such a result, and if Congress did intend that result it would have said so explicitly.

As discussed above, the statute authorizes refund of the amount that would be refundable "if *a claim* had been filed." The plain meaning of the word "claim," including its use in section 6512(b)(3)(B), *includes* a claim made on an original return, and, if such a claim had been filed Lundy would be entitled to a 3-year lookback. This construction is consistent with the words used in

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[11](...continued)
could obtain simply by eschewing the Tax Court as their forum, it would have said so clearly. Certainly, the Congress would have recognized the potential for confusion that would result from using the same word in the two relevant sections, intending a specific definition in only one of the sections. Speculation that Congress intended such confusion, especially when the severe consequence of forfeiture is the result, is cynical in the extreme. Further, the government's argument seriously undercuts its reliance on the "plain meaning" of the language used. The government's construction requires a meaning far removed from the plain meaning.

the statute, and has the virtue of equating the definition of the same word in the two sections.

Moreover, "* * * the language of a tax statute should not be turned in to a trap for the unwary." *Chu v. Commissioner*, 486 F.2d 696, 706, 73-2 U.S.T.C. ¶73-9750 (2nd Cir. 1973)(Judge Campbell, concurring in the result). This is especially true where the Commissioner's notice of deficiency, sometimes called the "ticket to the Tax Court," [12] fails to make any mention, whatsoever, of refunds of overpaid taxes. Given that taxpayers in the circumstances of this case are treated differently, under the government's and the Tax Court's view, depending on the forum in which they litigate their tax dispute, the trap is sprung when the unwary taxpayer, following the only suggestion for litigation contained in the notice of deficiency, files in the Tax Court.[13] That result flows only from a restrictive interpretation of the applicable statutory provision, which interpretation depends on a definition of the word "claim" as it is used in Section 6512 that is different than its use in Section 6511, and everywhere else in the Internal Revenue Code.

For the purpose of determining the amount that would be refundable under section 6511 if the taxpayer had filed a claim on the notice date, as directed by section 6512(b)(3)(B), once it is accepted that any such claim must be considered to be a valid and legally sufficient claim, such claim must, as a matter of law, be

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[12] *Estate of Yaeger v. Commissioner*, 889 F.2d 29, 34 (2nd Cir. 1989).

[13] The notice of deficiency advises a taxpayer that s/he may contest the IRS determination before making any payment by filing a petition with the Tax Court, that if petition is not filed within the applicable 90 day period the Tax Court cannot hear the case, and that if a petition is not filed within that time the law requires that the IRS assess and bill the taxpayer for the taxes said to be due. No mention is made of the possibility of litigating in any other court, and *no mention, whatsoever, is made concerning overpaid taxes*.

considered to contain sufficient information also to constitute a return. Because such a claim would be filed within three years from the time the return was filed (*i.e.*, simultaneously, see Rev. Rul. 76-511; *Risman,* 100 T.C. at *), the refundable amount would be determined under section 6511(b)(2)(A), and Lundy would be entitled to a refund.

2. Section 6511(a) provides three distinct rules, each of which applies to a specified class of taxes. The rule in section 6511(a) that provides "if no return was filed by the taxpayer, [a claim must be filed] within 2 years from the time the tax was paid" *does not apply to taxes for which a return is required*, hence it does not apply to the taxes in this case.

A. *The first clause of section 6511(a) provides the exclusive limitations period for all taxes for which a return is required to be filed.*

Section 6511(a) contains limitations rules for three distinct types of taxes. The first rule, which is the rule applicable in this case, provides:

> Claim for credit or refund of an overpayment of *any tax imposed by this title in respect of which tax the taxpayer is required to file a return* shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later * * *

Section 6511(a) (Emphasis added). This is the rule for *all taxes* for which a tax return is required; filing a return is neither necessary nor relevant to its operation. A return is generally required for income taxes, [14] so this clause specifies the period

[14] A return is required if gross income exceeds the sum of the

(continued...)

within which claims for refund of income taxes must be filed. This clause contains both a 3-year rule and a 2-year rule, and will be analyzed in depth, *infra*.

B. *Section 6511(a) contains a second "2-year rule," but that rule does not apply to taxes for which a return is required to be filed.*

Some confusion has arisen in the cases considering the present issue because section 6511(a) contains a *second* 2-year rule: [15]

> [Claim for credit or refund of an overpayment * * * shall be filed by the taxpayer * * *] if no return was filed by the taxpayer, within 2 years from the time the tax was paid.

Section 6511(a). Although this rule does not state explicitly to which taxes it applies, close analysis reveals that it *does not apply* to the taxes at issue in this case.

Section 6511 prescribes exclusive limitations periods for filing tax refund claims, rather than the general six-year limitations period for civil claims against the government. See *J.O. Johnson, Inc. v. United States*, 476 F.2d 1337, 1340-41 (Ct. Cl.), *cert. denied*, 414 U.S. 857 (1973); Treas. Regs. 26 C.F.R. section 301.6511(a)-1. Section 6511 applies to all taxes under the

[14](...continued)
personal exemptions to which the taxpayer is entitled and the standard deduction. Section 6012(a). For 1987, the standard deduction for married persons filing jointly was $3,760, section 63(c)(2)(C)(as in effect for 1987), and each personal exemption was $1,900. Section 161(d)(as in effect for 1987). A return for married persons filing jointly was required for 1987 if gross income exceeded the sum of $3,760 and $3,800, or $ 7,560. The Lundys' reported adjusted gross income for 1987 was $76,485, far in excess of the filing threshold.

[15] The third rule of section 6511(a) applies to taxes payable by stamp, and has no application to this case.

Internal Revenue Code, not only taxes for which returns are required.

However, not all taxes are required to be reported on a return, and Congress perceived that a separate rule was necessary to provide a limitations period for refund claims of "no return required" taxes. One example of a tax for which no return is required is the penalty pursuant to section 6672 (the so-called "Trust Fund Recovery Penalty," formerly called the "100% penalty"). See *Kuznitsky v. United States*, 17 F.3d 1029, 93-2 U.S.T.C. ¶50,491 (7th Cir. 1994); *US Life Title Insurance Co. v. United States*, 784 F.2d 1238, 1243 n.6, 86-1 U.S.T.C. ¶9278 (5th Cir. 1986) ("Since no returns are filed in the case of section 6672 liabilities, only the two-year rule has significance here."). Other examples are transferee liability under section 6901, see *Ancel v. United States*, 398 F.2d 456, 457, 68-2 U.S.T.C. ¶9470 (7th Cir. 1968), and the tax on prohibited transactions under section 4975. [16] Further, even some *income* taxpayers are not required to file a tax return. See footnote 14, *supra*. Even though a taxpayer may not have sufficient income to trigger a filing requirement, tax may be withheld during the year, or other tax payments might be made. Arguably, the three year rule, by its own terms, does not apply to this taxpayer, because no return is required to be filed. See also 26 C.F.R. section 301.6402-3(c), which provides that if no return is required, filing a return "shall be treated as a claim."

The history of section 6511(a) further supports the non-applicability of the "no return filed" clause to taxes with respect to which a return is required. As originally enacted, [17] the relevant portion of section 6511(a) read as follows:

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[16] This second 2-year clause might also apply in the case of a taxpayer whose property was wrongfully seized for payment of the taxes of another person. See *United States v. Williams*, __ U.S. __ (1995).

[17] Internal Revenue Code of 1954, ch. 736, 68A Stat. 808.

> (a) PERIOD OF LIMITATION ON FILING CLAIM. - Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer *within 3 years from the time the return was required to be filed* (determined without regard to any extension of time) or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. * * *

Internal Revenue Code of 1954, section 6511(a) (Emphasis added). In this original version of section 6511(a), in the case of taxes for which a return was required, taxpayers were *always* permitted a full three years from the date their returns were due within which to make a refund claim. Whether a return was actually filed was irrelevant, because the measuring date for the three year rule was the *return due date*, not the filing date. Under this original provision, a taxpayer who filed a claim for refund (even if that claim was not also a return) between 2 - 3 years after the taxes were paid, i.e., more than two but less than three years after the due date in the case of withheld taxes, would be entitled to a refund. Thus, for "return required taxes," the original rule applied *in all cases*, and the amount refundable was determined under section 6511(b)(2), *viz.*:

- If the claim was filed within three years of the due date, it was timely, and per section 6511(b)(2)(A) the taxpayer could obtain a refund of all taxes paid in the preceding three years.
- If the claim was filed more than three years after the due date, section 6511(b)(2)(B) limited the refund to amounts paid in the preceding two years.

Because this rule covered all possible circumstances, no additional rule was needed for return required taxes. Thus, the second 2-year rule was not meant to apply to taxes for which a

return was required. Where a tax was not reportable on a return, or a return was not otherwise required, obviously it would not be filed, and Congress provided, *in a separate rule*, that the claim must be filed within two years after payment. In those cases, section 6511(b)(2)(B) operated to limit the refund to amounts paid within the two year period before the claim was filed. [18]

Any other construction leads to an inevitable and irreconcilable conflict between these two clauses. If a return was required but not filed, the first clause would have permitted a claim for a full three years, whereas the second clause would bar it after two years. [19] This statutory clash is avoided by recognizing that the "no return required" rule simply does not apply if a return is required. There is no ambiguity here to resolve.

Further, if the second 2-year clause applied to taxes for which a return was required, it was redundant, because, as discussed above, there was no situation to which it could have applied that was not already provided for by the previous clause. To give effect to all of the words used by the Congress, this provision must be recognized to have been limited in its application only to

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[18] Tax refund claim cases always present two questions. The first question is whether a timely claim has been filed. This is governed by section 6511(a). If the claim is not timely under those rules, no refund is allowed. Section 6511(b)(1). If, and only if, a claim has been timely filed, the second question is how much may be refunded. This is where the section 6511(b)(2) limits come into play. An example will illustrate: Assume a return is required, taxes are overpaid by withholding, and the taxpayer makes an additional payment 2 years after the return due date. If the claim is not filed until 3 1/2 years after it was due, it is timely under section 6511(a), because it is filed simultaneously with the return. However, the amount refundable is limited because the two year look-back period will only reach the second payment (1 1/2 years before the claim was filed). See *Mills v. United States*, 805. F. Supp. 448, 450, 93-1 U.S.T.C. ¶50,019 (E.D. Tex. 1992) (discussing the "two limitations hurdles" imposed by section 6511.

[19] This again demonstrates why *Miller*, 38 F.3d 473, *infra*, is incorrect.

those taxes for which a return *was not required*, even though that is not explicitly stated. See *Mountain States Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (all of the words used by Congress are to be given effect). This is the only interpretation of this clause, as it appeared in the original version of section 6511(a), that does not render the words "in respect of which the taxpayer is required to file a return" superfluous.

Section 6511(a) was amended to its present form in 1958 [20] in order to conform the limitations period for refund claims with that for tax assessments. *Allen v. Commissioner*, 99 T.C. 475, 480-81 (1992). The amendment did not change the second 2-year rule, and was not addressed to -- and did not alter in any manner -- the applicability of the "return required" clause. *A fortiori* it did not make the "no return required" clause applicable to taxes to which it did not apply before the amendment, *i.e.*, taxes for which a return is required to be filed.

The government contends the purpose of this clause is unclear. (Br. at 30, note 12). The purpose becomes clear, however, on recognition that this (second) clause refers *only* to taxes for which the taxpayer was not required to file a return; that is, it *does not apply* to taxes for which a return is required. [21]

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[20] Section 6511(a) was amended to its present form in the Technical Amendments Act of 1958, Pub. L. 85-866, sec. 82(a), 72 Stat. 1663. S. Rept. 1983, 85th Cong., 2d Sess. (1958), 1958-3 C.B. 1019-1020, 775, 85th Cong., 1st Sess. (1957), 1958-3 C.B. 854-855, 912.

[21] It should also be noted that this interpretation does not mean that a taxpayer who litigates in the tax court always gets the benefit of the 3-year rule. For example, a deficiency notice issued more than three years after a return is filed can still be timely for a variety of reasons. See e.g., sections 6501(c)(1), (2), (7) & (8); 6501(e); 1034(g). If the deficiency notice is issued more than three years after a return was filed, a claim filed on that date *would not* have been filed within the required three year period, and the taxpayer would get the benefit of only a 2-year look-back,

(continued...)

In this light, it is also clear that *Miller v. United States*, 5 F.3d 473 (9th Cir. 1994), was incorrectly decided. *Miller* involved taxes for which a return was required, so the second 2-year clause is not applicable. As demonstrated, *supra*, the first 2-year clause also does not apply, because Congress intended that taxpayers would always have *at least* a 3-year period within which to file returns; the 1958 amendments to section 6511 were not intended to shorten the time within which any refund claim was required; their sole function was to *extend* the time within which some refund claims could be filed.

It is surprising that the government even suggests before this Court that *Miller* may be correct. First, the Internal Revenue Service ruled many years ago that taxpayers *do not lose* the right to claim a refund when two years have passed from the due date of the return. Revenue Ruling 76-511. Second, and of particular significance here, is that the government not only did not advance that argument in *Miller*, but actually advised the circuit court, in its brief in opposition to Miller's petition for rehearing, that it *disagreed* with the court's rationale, and suggested that the court should modify its opinion. [22] Third, as argued strenuously by Respondent Lundy in his merits brief in this Court, the IRS has for many years counseled taxpayers throughout the land that overpaid taxes could be claimed by filing a return any time up to three years after the return due date. It is way to late for the government to adopt this new interpretation.

The enormity of this problem is illustrated by a recent editorial published in the New York Times on July 29, 1995, by former IRS Commissioner Shirley D. Peterson, in which she noted that

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[21] (. . . c o n t i n u e d) under section 6511(b)(2)(B).

[22] The government argued that the outcome in *Miller* was correct, however, because Miller had not filed a return even within the 3-year period.

in 1990 10 million people did not file tax returns, and that almost 3.5 million of them were entitled to refunds. This is not an isolated matter that only affects a limited number of taxpayers. As this demonstrates, literally millions of Americans are being lulled each year by the IRS into believing they may claim refunds by filing late returns up to three years after they were due. The government is being disingenuous, and less than forthright with this Court in maintaining any position in support of *Miller*.

CONCLUSION

The refundable amount of an overpayment determined by the Tax Court is the same amount that would have been refundable had the taxpayer filed a claim for refund on the date the notice of deficiency was mailed. If a taxpayer were to file a claim at any time within three years of the return due date, that taxpayer would be entitled to a refund of all taxes overpaid in the prior three years. If a return has not already been filed, a claim must be made by filing a return. Even if the prescribed forms are not used, provided there is sufficient information for the claim submitted to constitute a valid claim, as a matter of law, it must also constitute a return. [23] No authority has been cited to support the government's argument that the "claim" referred to in section 6512(b)(3)(B) somehow is a wholly different creature than all other refund claims provided for in the Internal Revenue Code, yet that proposition is central to the government's argument.

If Lundy had filed a claim for refund on the date the notice of deficiency was mailed: (1) that claim would have had to constitute a return, as a matter of law, (2) that claim would have been filed

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[23] The corollary to this is that if there is not sufficient information, the submission would not constitute a valid claim. It is intuitively obvious that when Congress referred to a "claim" in section 6512(b)(3)(B), it referred to a *valid* claim. No other construction would make any sense at all.

within three years after the return was filed (*i.e.*, simultaneously) and (3) he would have been entitled to refund of his overpaid taxes for 1987.

The decision of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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